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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

GERRY W. MONROE, *et al.*, and LEE F. HIGMAN, *et al.*,
Cross-Petitioners,

vs.

UNITED AIR LINES, INC. and AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Respondents.

BRIEF IN OPPOSITION TO CONDITIONAL CROSS-PETITION OF GERRY W. MONROE, *et al.*, AND LEE F. HIGMAN, *et al.*, FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

EDWARD L. FOOTE
Counsel of Record
EDWARD J. WENDROW
CALVIN SAWYIER
WINSTON & STRAWN
One First National Plaza
Suite 5000
Chicago, Illinois 60603
312/558-5600
EDWARD H. HOENICKE
STEPHEN SAWYER
P.O. Box 66100
Chicago, Illinois 60606
312/952-7385
Attorneys for United Air Lines, Inc., Respondent.

Pandick Midwest, Inc., Chicago • 454-7600

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Respondent, United Air Lines, Inc. ("United"), respectfully prays that the Conditional Cross-Petition for Certiorari of Gerry W. Monroe, *et al.*, and Lee F. Higman, *et al.*, served on United on December 12, 1984, be denied.

Statement of the Case

The proceedings below have been adequately described in the Petition For Certiorari filed by United in No. 84-774 and the Cross-Petition For Certiorari of Air Line Pilots Association, International (No. 84-958) filed in response thereto. The Statements of the Case therein are incorporated here by reference.

Reasons This Conditional Cross-Petition Should Not Be Granted

I. "Discriminatory motive" is a meaningless redundancy when what is at issue is an express age-based BFOQ rule that is discriminatory on its face and intended to be so. This is essentially the position which the Seventh Circuit took in connection with the erroneous instructions for which it ordered a new trial. (Pp. A7-A11, A12-A15 of United's Petition for Certiorari in No. 84-774.) Animus against over-60 employees and pretext to hide age discrimination are concepts irrelevant to a BFOQ defense of an explicit under-60 age rule.

To make evidence of a discriminatory motive relevant at all stages of a suit charging violation of the ADEA by an express age-based BFOQ rule would be, in effect, to direct a verdict for plaintiffs.

Cross-Petitioners' first point is without substance.

II. The Cross-Petition misstates the treatment of the BFOQ instruction in the proceedings below. The so-called *Tamiami-Orzel* test, as stated by the Seventh Circuit some three months after the jury was instructed here, is not the different animal claimed by Cross-Petitioners from the *Greyhound* test which was tendered by United as the conceded law of the Seventh Circuit at the time of submission to the jury here. Both tests are the same in respect to the critical aspect that the BFOQ defense is established by showing a factual basis for *reasonable belief* by the common carrier that a blanket age rule is the prudent way to assure against untoward incapacitation in jobs related to the safe carriage of public passengers. *Orzel* v. *City of Wauwatosa Fire Dept.*, 697 F.2d 743, 753 (7th Cir. 1983), *cert. den.* 104 S.Ct. 484 (1983); *Hodgson* v. *Greyhounds Lines, Inc.*, 499 F.2d 859, 863, 865 (7th Cir. 1974), *cert. den.* 419 U.S. 1122 (1975). See also, Brief of Petitioner in No. 83-1545, *Western Air Lines, Inc.* v. *Criswell*, pp. 37-42; Cross-Petition Of Air Line Pilots Association, International For Writ of Certiorari to the

United States Court of Appeals for the Seventh Circuit, No. 84-958, *Air Line Pilots Association, International* v. *Higman, et al., Gerry W. Monroe, et al.*, pp. 20-24.

Cross-Petitioners erroneously assume (p. 9) the correctness of their proffered *Tamiami-Orzel* instruction. However, that instruction omitted the essential factor that the BFOQ defense can be established—in the situation where age bears a reasonable relationship to the essential nature of the airline's business of safely carrying passengers—simply by proof of a factual basis for *a reasonable belief* that future assurance against incapacitation after age 60 cannot be determined on an individualized basis. *See, e.g., E.E.O.C.* v. *Missouri State Highway Patrol,* BNA Daily Labor Report, 11-26-84, D-1, at pp. D-2, D-5 (8th Cir. 11/12/84).

As against the too rigid instruction proferred by Cross-Petitioners the reasonable belief standard of *Greyhound* was quite properly submitted by United. The problem was created by the trial judge himself who undertook to draft his own hybrid instruction and who, in so doing, ended up with the patently misleading instruction which the Seventh Circuit held to be reversible error. Cross-Petitioners' claim that this raises a question involving the fundamental administration of justice borders on the ridiculous.

Finally, the question of the appropriate BFOQ instruction applicable to ADEA suits against commercial airlines' age-60 cockpit rule for flight engineers will presumably be resolved by this Court's forthcoming decision in *Western Air Lines, Inc.* v. *Criswell,* No. 83-1545, set for argument January 14, 1985.

Conclusion

For the foregoing reasons, the Conditional Cross-Petition for Certiorari of Gerry W. Monroe, *et al.*, and Lee F. Higman, *et al.*, should be denied.

Respectfully submitted,

EDWARD L. FOOTE
Counsel of Record
EDWARD J. WENDROW
CALVIN SAWYIER
WINSTON & STRAWN
One First National Plaza
Suite 5000
Chicago, Illinois 60603
312/558-5600
EDWARD H. HOENICKE
STEPHEN SAWYER
P.O. Box 66100
Chicago, Illinois 60606
312/952-7385
Attorneys for United Air Lines, Inc., Respondent.